IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1424

HENRY A. CIOVACCO, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner, Henry A. Ciovacco, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on this case February 23, 1976.

JURISDICTION

The judgment of the Court of Appeals was entered February 23, 1976. The jurisdiction of this Court rests on the Fourth Amendment of the Constitution, Rule 41 of the Federal Rules of Criminal Procedure and 28 U.S.C. 1254.

STATUTE INVOLVED

The Fourth Amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

QUESTIONS PRESENTED

1. Whether the Court below was in error in allowing into evidence materials seized as a result of an illegal Search and Seizure of appellant's airplane at Marshfield, Massachusetts on July 24, 1973.

2. Whether the Court below was in error in denying appellant's Motion for Judgment of Acquittal.

STATEMENT OF THE CASE

1. Petitioner, Ciovacco's, plane had been at Port Lavaca, Texas on June 4, 1973. While refueling at 4:00 a.m., one engine was left running, and the fuel had been paid for in cash. This activity was considered suspicious by the authorities, due to the proximity of Port Lavaca to Mexico.[1] The information had been relayed to Boston, since the plane was registered to a Massachusetts resident (Incorporated Appendix 278-279).[2]

[1] Port Lavaca is approximately 200 miles north of the border with Mexico.

[2] Hereinafter referred to as I.A.

2. On July 24, 1973, the same plane was observed at Corpus Christi. The pilot indicated that he was headed north, but turned south, and continued south for approximately fifty miles before radar contact was lost (I.A. 279).

3. On July 25, 1973, at 4:00 a.m., the aircraft was again spotted at Port Lavaca; one engine was left running, and the fuel was paid for in cash (I.A. 279).

4. The plane was due in the Boston area at 4:00 p.m., July 24, 1973. It touched down at Norwood at 4:45 p.m., and finally landed at Marshfield at 5:00 p.m. (I.A. 279).

5. Defendant, Ciovacco, climbed out of the aircraft and secured it to the ground – a procedure which required five to ten minutes. A short time after the plane had landed, Officer Charles Teague of the Marshfield Police arrived to assist Kelley and Handcox. None of these men were in uniform (I.A. 273).

6. An automobile was backed up to the plane after it landed.

7. Kelley walked briskly out to the plane, confronted Ciovacco, and identified himself as an agent of the Bureau of Narcotics and Dangerous Drugs. Handcox and Teague had arrived at the scene at approximately the same time from a different direction. There was little conversation. After Kelley identified himself, he asked to inspect the cargo and Ciovacco answered, "Okay". None of the officers had a warrant to search the plane (I.A. 274, 276).

8. No guns were visible – at least until after the search and arrest (I.A. 274).

9. Ciovacco was not aware of his right to refuse to submit to the search (I.A. 276).

10. The evidence established consent, but not voluntariness, and there was no demeanor evidence or

statements introduced to show that the defendant was resigned to the fact that he had been caught in the act (I.A. 276).

Based on the above facts, Judge Freedman in the District Court granted the defendant-appellant's Motion to Suppress.

11. The appellee, United States of America, appealed said finding, and this Honorable Court, in a decision dated June 10, 1975, reversed and remanded said finding with instructions to deny the Motion to Suppress.

12. At trial the evidence seized on July 24, 1973 from the appellant, Ciovacco's, airplane was admitted in evidence at his jury trial; and the jury, having returned a verdict of guilty, he was committed.

13. On February 23, 1976, by memorandum and order, the United States Court of Appeals for the First Circuit summarily affirmed the judgment of the District Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

Certiorari should be granted in the present case since the petitioner alleges that he did not consent to the search of his airplane on July 24, 1973 at Marshfield, Massachusetts, and that if he had consented to said search, it is not with the "totality of the circumstances test" of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Both the United States Magistrate and the trial judge ruled and held after hearing the witnesses on petitioner's Motion to Suppress that the respondent did not voluntarily consent to the search of his airplane, and therefore, he did not waive his constitutional rights under the Fourth Amendment (see Incorporated

Appendix, Page 271 – Decision of Magistrate, and Incorporated Appendix of the Trial Judge, Incorporated Appendix, Page 279).

CONCLUSION

In view of the conflict between the United States Magistrate's and the trial judge's findings, as set out above, that the petitioner's Fourth Amendment rights were violated by Federal agents, after hearing the live witnesses, and the United States Court of Appeals for the First Circuit's opinion and memorandum and order that such conduct was within "totality of the circumstances test" of *Scheneckloth vs. Bustamonte*, 412 U.S. 218 (1973), the petitioner respectfully requests that this Court accept his Writ of Certiorari so that this Honorable Court may review this case.

Respectfully submitted,
By,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1343.

UNITED STATES OF AMERICA,
Appellee,

v.

HENRY A. CIOVACCO, JR.,
Defendant, Appellant.

MEMORANDUM AND ORDER

Entered February 23, 1976

The appellant raises only one issue: The admissibility of materials seized during a search of his plane. We have already decided this issue adversely to petitioner in *United States v. Ciovacco*, 518 F.2d 29 (1st Cir. 1975). Not only did the earlier case present precisely the same issue (holding that appellant's consent was not coerced under the totality of the circumstances test of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)), but further, the appeal raises no new arguments warranting reconsideration.

Pursuant to Local Rule 21, the judgment of the district court is summarily affirmed.

By the Court:

/s/ Dana H. Gallup
Clerk.

[cc: Messrs. Redmond and Cohen.]

United States Court of Appeals
For the First Circuit

No. 74-1430

UNITED STATES OF AMERICA,
APPELLANT,
v.
HENRY CIOVACCO,
JOHN STANTON,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Lawrence P. Cohen, Assistant United States Attorney, Deputy Chief, Criminal Division, with whom *James N. Gabriel*, United States Attorney, was on brief, for appellant.

Martin S. Cosgrove for Henry Ciovacco, appellee.

Mitchell Benjoya, *Charles L. Field*, and *Zisson & Benjoya* on brief for John Stanton, appellee.

June 10, 1975

McENTEE, *Circuit Judge*. On the afternoon of July 25, 1973, Agents Kelley and Handcox of the Bureau of Narcotics and Dangerous Drugs were stationed at Marshfield Airport awaiting the possible arrival of a certain private plane registered to defendant Ciovacco, a commercial airline pilot, which they suspected might contain contraband. The plane landed and Ciovacco climbed out and set about securing it. Meanwhile Officer Teague of the local police arrived to assist the agents. None were in uniform. Shortly thereafter defendant Stanton drove up to the aircraft in his

car. After some conversation with Ciovacco he proceeded to the administration building about 75 yards distant, while Ciovacco backed the automobile up to the aircraft and opened the trunk. Kelley walked briskly out to the plane, identified himself, and asked permission to inspect the cargo. Handcox and Teague arrived at the craft at approximately the same time but from a different direction. The court found that no weapons were visible at the time, and that Ciovacco answered "O.K." to Kelley's request and opened the plane's baggage door himself. Having made detailed findings, the court concluded that Ciovacco's consent was not voluntary and granted defendants' motion to suppress.

The court was rightly concerned by the burden of proof language in *Bumpers* v. *North Carolina,* 391 U.S. 543 (1968), and *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973). Nevertheless, although the case is a close one, our own analysis of the district court's admirably fair and comprehensive findings of fact lead us to conclude that the government maintained its burden of proving Ciovacco's consent uncoerced under the "totality of all the circumstances" criterion of *Schneckloth.* The evidence revealed that the agents employed no force or threats in seeking permission to inspect the aircraft. Ciovacco agreed without apparent hesitation and in fact produced the keys and opened the compartment himself. Many recent cases have held that consent given in closely analogous circumstances is voluntary. *See, e.g., Schneckloth* v. *Bustamonte, supra; United States* v. *Judge,* 501 F.2d 1348 (5th Cir. 1974); *United States* v. *DeMarco,* 488 F.2d 828 (2d Cir. 1973); *United States* v. *Crain,* 485 F.2d 297 (9th Cir. 1973); *Leavitt* v. *Howard,* 462 F.2d 992 (1st Cir. 1972); *United States* v. *Fields,* 458 F.2d 1194 (3d Cir. 1972); *Government of the Virgin Islands* v. *Berry,* 385 F.Supp. 134 (D. V.I. 1974);

United States v. *Kohn,* 365 F.Supp. 1031 (E.D. N.Y. 1973), *aff'd mem.,* 495 F.2d 763 (2d Cir. 1974). The court noted that several of the cases finding voluntary consent have relied on the fact that the defendant was engaged in an exculpatory strategem.* We have held, however, that knowledge that a search will inevitably prove incriminating does not negate the possibility that consent is voluntary and not the product of coercion. "[T]he pressure exerted on a criminal by the realization that the jig is up is far different from the deliberate or ignorant violation of personal right that renders apparent consent ineffective." *Gorman* v. *United States,* 380 F.2d 158, 165 (1st Cir. 1967). This principle is no less true after *Schneckloth. See Government of the Virgin Islands* v. *Berry, supra; United States* v. *Kohn, supra.*

The only fact found by the court tending to support its conclusion that Ciovacco's consent was coerced was his ignorance of his right to withhold it. The courts in several of the cases above have validated consents of persons not apprised, and presumably unaware, of their right to withhold their consent. *See Schneckloth* v. *Bustamonte, supra; United States* v. *DeMarco, supra; Government of the Virgin Islands* v. *Berry, supra.* Since the defendants in these cases were more likely by reason of age, education, and socio-economic status to find the police request to inspect coercive than Ciovacco, we do not believe that his ignorance alone could outweigh the other convincing indicia of voluntariness.

We recognize that in holding on similar facts in *Leavitt, supra,* that the state court's finding of voluntariness was not clearly erroneous, we stated in dictum that such a find-

* The court also noted that *DeMarco, supra,* was distinguishable because of the "amiability" prevailing between defendant and the police. While the court in that case did in reciting the facts characterize the few moments of conversation between the parties as "from all accounts amiable," it is not clear that it was any less so in the present case, and the holding in *DeMarco* did not turn on this characterization.

ing was not compelled, 462 F.2d at 998, though we also noted that the record did not leave us with "any conviction, much less a firm one, that the state court was mistaken," *id.* at 996. However, while that case was stronger for voluntariness in some respects (the defendant had a possible exculpatory motive for consenting and had been warned of his rights beforehand) it was weaker in others (the defendant, only 20 years of age, had been wounded while committing the crime, taken to the hospital, and thereafter invited to the police station where he was informed he was suspected of murder and told to empty his pockets before being asked to consent to the search). The facts as found by the court below do not sufficiently distinguish the instant case from those cited above. We reverse and remand with instructions to deny the motion to suppress, and therefore need not consider defendant Stanton's standing to make the motion.

Reversed and remanded.